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No. 515.

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

GUY T. HELVERING,
Commissioner of Internal Revenue,
Petitioner,

vs.

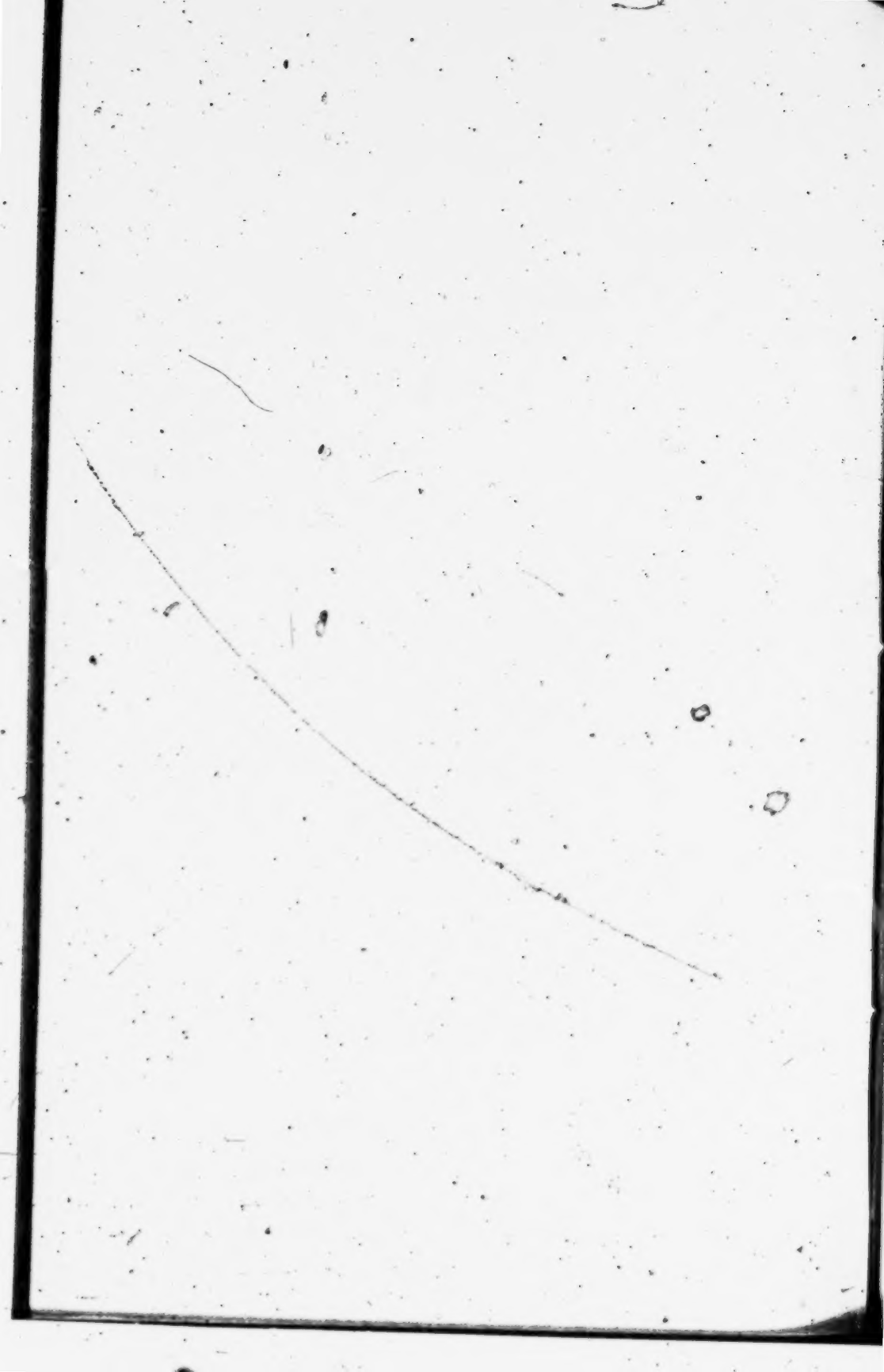
THE NEWPORT COMPANY,
Respondent.

On Petition for Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY OF THE RESPONDENT TO THE PETITION.

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INDEX.

	Page
The decree of the Supreme Judicial Court of Maine is not open to collateral attack	2-5
The instruments relied on as waivers are without effect to extend the period or lift the bar of the statute	5-21
The decision of the court below is not in conflict with the decisions referred to on pages 13 and 14 of the petition	22-25

CITATIONS.

CASES.

Brant vs. Virginia Coal & Iron Co., 93 U. S. 326, 335	17, 19
Burnet vs. Clark, decided December 12, 1933, 53 S. Ct. 207, 209	23
Burnet vs. Commonwealth Mfg. Co., decided December 12, 1932, 53 S. Ct. 198, 199	23
Carter vs. Stewart Drug Co., 115 Maine 289	6
Central Mfg. Co. vs. Cambria Steel Co., 210 Fed. 696, 718	17
Crossman vs. Vivienda Water Co. (Calif.), 89 Pac. 335, 336, 337	6
Edwards vs. Elliott, 21 Wall. 532, 557, 558	3
Fellows vs. National Can Co., 257 Fed. 970, 977; certiorari denied, 250 U. S. 662	19
Grouf vs. State National Bank (C. C. A. 8th Cir.) 40 Fed. (2d) 2, 7	17, 20

Cases—*Continued.*

	Page
Hall vs. Law, 101 U. S. 461, 463, 464	4
Harvey vs. Tyler, 2 Wall. 328, 342-346	4
Hirning vs. National Reserve Bank, (C. C. A. 8th Cir.) 52 Fed. (2d) 382, 388	19
Lucas vs. Hunt, 45 Fed. (2d) 781	23
Newport Co. vs. Commissioner, 22 B. T. A. 843, 846	15, 18, 20
Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257	6
Phillips vs. Lyman H. Howe Films Co., 32 Fed. (2d) 891	22
Planters Cotton Oil Co. vs. Hopkins, 286 U. S. 332; 52 S. Ct. 509	22
Shore Line Road vs. Maine Central R. R., 92 Maine 476	6
Standard Sanitary Mfg. Co. vs. Arrott, (C. C. A. 3rd Cir.) 135 Fed. 750, 757	17, 20
Twining vs. New Jersey, 211 U. S. 78; 29 S. Ct. 14, 16	5
Updike vs. U. S., 8 Fed. (2d) 913	11
U. S. vs. Updike, 281 U. S. 489, 496	22
Virtue vs. Creamery Package Mfg. Co., 227 U. S. 8; 33 S. Ct. 202, 208	3
Vorhees vs. Bank of U. S., 10 Pet. 449, 472, 474, 478	4

Cases—*Continued.*

	Page
Walker vs. Sauvinet, 92 U. S. 90, 93	3
Warner Collieries Co. vs. U. S., 63 Fed. (2d) 34	23
Wayne Body Corporation vs. Commissioner, 23 B. T. A. 401, 411	21
Wilson vs. McNamee, 102 U. S. 572, 574	3
Woodley Petroleum Co. vs. Commissioner, 16 B. T. A. 253, 256	22

TEXT BOOKS.

Bigelow on Estoppel, 634, 635	20
Cook on Corporations (8th Ed.), Vol. 3, Sec. 673	11
Corpus Juris, Vol. 3, Secs. 689, 693	3
Pomeroy's Equity Jurisprudence (3rd Ed.), Sec. 810	19
Ruling Case Law, Vol. 15, Sec. 356, p. 878	4
Ruling Case Law, Vol. 10, Sec. 150, p. 845	17

STATUTES.

R. S. Maine, Chap. 47, Sec. 77	6
Revenue Act 1926, Reg. 69, Art. 1291	10

MISCELLANEOUS.

Cumm. Bull. V-2 p. 79	11
Cumm. Bull. III-2 286	16
Prentice-Hall Tax Service, 1931, Par. 821	25

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REPLY OF THE RESPONDENT TO THE PETITION.

The questions raised in the petition (p. 2) will be answered under the following headings:

1. The decree of the Supreme Judicial Court of Maine dissolving the transferor was not void and is not open to collateral attack.

2. The instruments relied on as waivers were ineffectual to extend the period, or lift the bar of the statute of limitations.

3. The decision does not conflict with those referred to on pages 13 and 14 of the petition or any other decision that we know of.

I.

The decree of the Supreme Judicial Court of Maine dissolving the transferor was not void and is not open to collateral attack.

1. No question as to the validity of the decree was raised before the Board of Tax Appeals and the question was therefore not open to review in the appellate court.

As expressly stated in the record, a certified copy of the dissolution proceedings was received in evidence without objection (Rec. 18). One of the assignments of error on which the petition for review was based is that the Board erred in not expressly finding that the Chemical Company went entirely out of business and ceased to exist (Rec. 147). The only evidence in the case that it ceased to exist were the dissolution proceedings offered for that purpose and received without objection. The claim that the decree was void was evidently an afterthought. The petitioner should not be allowed to take inconsistent positions.

Questions not raised in the trial tribunal will not be considered on appeal,

Virtue vs. Creamery Package Mfg. Co., 227 U. S. 8; 33 S. Ct. 202, 208;
Walker vs. Sauvinet, 92 U. S. 90, 93;
Edwards vs. Elliott, 21 Wall., 532, 557, 558;
Wilson vs. McNamee, 102 U. S. 572, 574.

As stated in *Corpus Juris*, Vol. 3, Secs. 689, 693, while this rule

> "is supportable on a number of considerations, it is usually based on the ground that the opposite party should have the proper opportunity to avoid, by amendment or by supplying any defects in his proof, the effect of the objection."

The proceedings offered in evidence were not the originals but a certified copy. If it was essential to the validity of the proceedings that the *complaint* should have stated there were no liabilities, it might have been shown if the question had been raised that the apparent defect in the complaint was a clerical error in the certified copy.

2. If the question can be raised here, the validity of the decree is not open to collateral attack.

Notwithstanding the question was not raised before the Board of Tax Appeals it was fully considered by the court below and held to be without merit (Rec. 163). There can be no doubt of the correctness of that ruling.

Where the necessary parties are before the court and it has jurisdiction of the subject matter, it has authority to decide every question involved in the

proceedings, and its judgment whether right or wrong, is not open to collateral attack.

Hall vs. Law, 101 U. S. 461, 463, 464;
Harvey vs. Tyler, 2 Wall., 328, 342-346;
Vorhees vs. Bank of U. S., 10 Pet. 449, 472, 474, 478.

As held in *Harvey vs. Tyler,* the rule is the same whether jurisdiction is derived from the common law or conferred by statute.

The case involved the construction and application of a statute of the state. The necessary parties were before the court and it is conceded that the court was authorized in the proceedings before it to dissolve the corporation, but it is claimed that it should have appointed a trustee or receiver (Pet. p. 17). At most, that was mere error which did not go to the question of jurisdiction. Under the terms of the statute, whether a trustee or receiver should be appointed depended *not upon the complaint,* but upon the proof. As stated in 15 *Ruling Case Law,* Sec. 356, p. 878:

> "The general rule of law is that, when a court of competent jurisdiction has rendered a judgment in relation to any subject-matter within its jurisdiction, the presumption arises that it had before it sufficient evidence to authorize it to award such judgment, and where facts were required to be proved to confer jurisdiction that such facts were duly proved although the record is silent upon the matter."

The pleadings will be deemed amended, if necessary, to conform to the proof.

3. **The Supreme Judicial Court of Maine is the highest court of the state and its decision involving the construction and application of the statute of the state is the act of the state itself.**

Twining vs. New Jersey, 211 U. S. 78; 29 S. Ct. 14, 16.

There can therefore be no fatal variance between the terms of the statute and the construction and application thereof by the highest court of the state.

4. **The decree of the court recited that it appeared to the court that the defendant corporation had no debts and no assets** (Rec. 21).

This met the requirement of Section 101 of the statutes referred to and quoted on page 26 of the petition. There was no conflict between the terms of the decree and anything required by the statutes.

II.

The instruments relied on as waivers were without effect to extend the period or lift the bar of the statute of limitations.

The instruments that were relied upon as waivers by the petitioner in the court below, are referred to and correctly described in the opinion of the court (Rec. 161, 162). It is expressly stated in the petition that no claim is made for the first, December 15, 1920 which expired April 1, 1924 (Pet. 16).

Likewise, no claim is made for the second dated December 11, 1923, which is not referred to in the petition.

The third, undated, but bearing the stamp "Received February 26, 1924" the petitioner admitted in the court below did not extend the time for assessment beyond April 1, 1925 (Rec. 161, 162).

That leaves for consideration only the remaining four instruments referred to in the opinion beginning with the one dated December 23, 1924, and ending with the one dated November 6, 1926 (Rec. 162). Of these, the first two, the one dated December 23, 1924 and the other, January 12, 1926, were signed in the name of the Chemical Company by H. J. Schlesinger as vice-president who severed all connection with the respondent in the spring of 1922 and had no interest in it thereafter (Rec. 162).

The Chemical Company under the laws of Maine ceased to exist for all purposes March 1, 1923, three years after the date of its dissolution.

R. S. Maine, Chap. 47, Sec. 77;
Shore Line Road vs. Maine Central R. R., 92 Maine 476;
Carter vs. Stewart Drug Co., 115 Maine 289;
Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257;
Crossman vs. Vivienda Water Co., (Calif.) 89 Pac. 335, 336, 337 and numerous authorities referred to therein.

With the exception of the instrument dated November 6, 1926, signed in the name of the respondent it is

not claimed by the petitioner that the instruments relied on were valid in themselves but that the respondent as transferee is estopped to deny their validity (Pet. 3).

We shall consider first, the instrument dated November 6, 1926, after the passage of the 1926 Act, assuming that the prior instruments referred to were invalid and without effect as waivers, and that further assessment of the Chemical Company was barred by the statute at the time of the passage of the 1926 Act.

1. **The instrument of November 6, 1926, was ineffectual to lift the bar of the statute.**

Since the petition was filed, the decisions referred to on page 15 of the petition involving the question of the retroactive effect of the repeal of Section 1106 (a) 1926 Act have been affirmed by this Court. Unless that question is to be reconsidered, it would seem unnecessary to consider further the above instrument. However, a contrary decision in those cases would not affect the result in this case, because:

(1) By the terms of the instrument dated November 6, 1926 it applied as a waiver only to taxes *then due* from the Chemical Company under any return filed by it for the years 1917 and 1918 and period ended June 20, 1919 (Rec. 62). If the prior instruments were invalid the liability of the Chemical Company for taxes was barred by the statute of limitations at the time of the passage of the 1926 Act, and by Section 1106 (a) was extinguished at the time of the execution of the instrument November 6, 1926, whether it was revived

by the subsequent repeal of Section 1106 (a) or not. There were thus no taxes *due from the Chemical Company* under its return for the year 1917 at the time of the execution of the instrument in question *and it therefore waived nothing,* even if the effect of the subsequent repeal of Section 1106 (a) was to revive a pre-existing liability. Such liability if revived by the repeal of Section 1106 (a) as of the date of its enactment, would still be subject to the bar of the statute *as it was at the time of the passage of the 1926 Act.* An instrument in writing purporting to waive legal rights must naturally be limited to the necessary legal effect of its terms, strictly construed. Assuming that it was the intent of Congress in repealing Section 1106 (a) as of the date of its enactment, to nullify that section as though it had never been enacted, *its enactment was none the less a fact,* and its terms and legal effect while it continued in force must be considered in determining the effect of the instrument here in question executed while it was in force. The effect of the instrument as a waiver must depend upon the intent expressed therein under the conditions existing at the time of its execution. The construction to be placed upon it cannot be affected by the intent of Congress in subsequently repealing Section 1106 (a). The intent of the instrument as expressed in its terms was to waive the time prescribed by law only for the assessment of taxes then due under the returns of the Chemical Company for the years referred to. The existence of Section 1106 (a) and its legal effect while it continued in force must, hence, be considered in determining what taxes were due under the return of the Chemical Company for the year 1917 at the

time of the execution of the instrument in question, *as by its terms it applied only to the assessment of such taxes then due.*

(2) The contract of the respondent to pay the liabilities of the Chemical Company applies only to its liabilities existing at the time of the contract. When those liabilities were once extinguished the obligation of the contract was discharged. The obligation of the contract once discharged could not be revived by statute even if Congress might re-impose the pre-existing tax liability on the taxpayer. The same must be true of the liability of the transferee at law or in equity independent of its contract. In either case the liability of the transferee once extinguished, could not be revived by Statute.

2. The respondent is not estopped to deny the validity of the prior instruments relied on as waivers.

The Board of Tax Appeals found against the claim of estoppel upon the facts of the case. It is the well settled rule that decisions of the Board on questions of fact will not be disturbed if supported by evidence.

The court below found upon a review of the record that the decision of the Board of Tax Appeals on the question of estoppel was supported by substantial evidence (Rec. 164). There is no explicit claim in the petition to the contrary and we assume that another review of the record on that question is not called for. No brief accompanied the petition which is little more than a general statement of the petitioner's claims.

The claim of estoppel rests upon the claim that the instruments executed as waivers for the Chemical Company after it had ceased to exist were procured by the respondent. The references in the petition to the record in support of the claim are wholly insufficient to establish any such claim (Pet. 17). On the other hand it is completely negatived by other parts of the record. If we may consider briefly the evidence referred to in support of the claim:

(1) The first is to the effect that mail addressed to the Chemical Company after it was dissolved would naturally be received by the respondent (Rec. 32-33).

That in itself would not, of course, make the respondent responsible for instruments executed in the name of the *Chemical Company* by one having no interest in or connection with the respondent.

As stated above, all of the instruments executed as waivers in the name of the dissolved *Chemical Company* after it had ceased to exist were signed by H. J. Schlesinger as its vice-president. H. J. Schlesinger *at the time of signing these instruments had no interest in or connection with the respondent.* He sold out all of his interest in the respondent in the spring of 1922 and thereafter had no connection with it (Rec. 28). He did, however, have a personal interest in the determinations of the tax liabilities of both the Newport Mining Company and the Chemical Company. Both of these companies were dissolved at the same time (Rec. 21) and prior to their dissolution both

transferred all of their assets (Rec. 38, 17) leaving their stockholders liable as transferees for any deficiencies in tax that might be found against them as dissolved corporations.

Regulations 69, Article 1291, 1926 Act;
Updike vs. U. S., 8 Fed. (2d) 913;
Cook on Corporations, (8th Ed.) Vol. 3, Sec. 673.

H. J. Schlesinger was one of the five owners (stockholders) of both of the dissolved companies (Rec. 34). He was, therefore, liable as a transferee of the dissolved Chemical Company notwithstanding the Newport Company may also have been liable. As said in Cumm. Bull. V-2, p. 79 (July to December, 1926), Opinion General Counsel, Bureau of Internal Revenue:

> "Although in all probability the government may sue under the contract of sale executed by the two corporations whereby the O company assumed to pay the debts of the M company, this should be considered as a secondary remedy, since it may be used, subject to the bar of the statute of limitations, after the remedies against the M company may have been exhausted. A taxpayer may not, by a contract providing that a third person pay its taxes, force the government to collect from such third person."

The tax liabilities of the Mining Company for the year 1917 were involved with those of the Chemical

Company under the consolidated return filed by the Newport Company in which the Chemical Company was included as an affiliated company (Rec. 18, 128, 129). As a transferee of the Newport Mining Company H. J. Schlesinger as one of its stockholders was liable for any deficiency in tax found against the dissolved corporation. His active interest in the determination of the tax liabilities of the Newport Mining Company and its affiliated companies in which were included the *Chemical Company* is shown by his letter to the Commissioner signed by him in the name of the then dissolved and extinct Newport Mining Company August 28, 1923 (Rec. 45-46).

H. J. Schlesinger is thus shown to have had a personal interest of his own in the tax liabilities of the *Chemical Company* amply sufficient to explain his execution of the several instruments in its name, independent of any interest the respondent may have had in the matter. The record shows that he was present throughout the hearing before the Board of Tax Appeals under subpoena as a witness for the government, *but was not placed on the stand or called upon to explain his execution of the various instruments in the name of the Chemical Company after it had ceased to exist* (Rec. 64).

(2) The next of the references relate to a protest of the Newport Mining Company in October 1923 against a determination by the Commissioner of the tax liabilities of itself and affiliated companies for the year 1917 (Rec. 36-39).

The only connection of the respondent with that instrument shown by the record is in the verification of it in which the affiant stated that all of the assets of the Newport Mining Company in whose name the appeal was taken were transferred to and divided between the Steel and Tube Company of America and the Newport Company on or about July 31, 1919 and thereafter "in the early part of the year 1920 said the Newport Mining Company was dissolved." That at the times referred to the affiant was an officer of the Mining Company and was at the time of the affidavit the vice-president of the Newport Company and president of the Steel and Tube Company of America, and that he was verifying the appeal in these several capacities (Rec. 38).

At the time of that protest and appeal, *October, 1923,* the one valid waiver given by the Chemical Company, December 15, 1920, while it was still in existence and could give a waiver, was in force and did not expire until April 1, 1924. That the respondent joined in the verification of that instrument cannot charge it with responsibility for subsequent protests or waivers given in the name of the *Chemical Company* after it had ceased to exist and the period for any further assessment had expired and with which it (the respondent) had nothing to do.

(3) The next relates to another protest of the Newport Mining Company, in December, 1924 (Rec. 48-52).

There is no reference to the Newport Company in the protest here referred to, or in the letter shown on

page 52 of the record in which it was transmitted to the Commissioner. The instrument referred to purported to be a protest of the Newport Mining Company and the Dunn Iron Mining Company on the ground that in the redetermination by the Commissioner of their tax liabilities referred to therein, their affiliation with the Chemical Company was denied (Rec. 49). As bearing upon the claim that the respondent was in any way involved in the proceeding, it is significant to note that it was stated in the instrument referred to that the *Chemical Company* was filing a separate protest of even date for itself on the same ground (Rec. 50). The letter of the attorney enclosing the protest of the two mining companies stated that *a protest of the Chemical Company was also enclosed* (Rec. 52).

The protest of the *Chemical Company* which was presumably on file and in the hands of the Commissioner at the time of the hearing before the Board, *was not offered in evidence.* The inference must be that it did not support the claim of the Commissioner that the respondent was responsible for it or in any way connected with it or other enclosures in the letter.

(4) The next and last relates to an instrument purporting to be a protest of the Chemical Company (Rec. 58-60, 53).

That instrument while purporting in the body thereof to be a protest of the Chemical Company, was not signed or executed by any one but was verified as to its contents by an attached affidavit made by A. A. Schlesinger who stated that he was the vice-presi-

dent and treasurer of the Chemical Company *until its dissolution in the year 1920* prior to which it had transferred all of its assets to the Newport Company and that at the time of the affidavit he was president of the Newport Company in active, charge, management and direction of its affairs; that he had read the protest to which his affidavit was attached and that the same was true to the best of his knowledge, information and belief (Rec. 60). As will be noted, the affidavit referring to the unsigned instrument to which it was attached, does not state that the verification was made by the affiant *as the president* of the Newport Company. It merely states *the fact* that he was at the time of the affidavit its president and in active charge of its affairs. There is no statement in the affidavit that it was made by the authority of the respondent. There is nothing in the affidavit *inconsistent with a positive refusal of the respondent* to have anything to do with the unsigned instrument to which it referred. It was treated by the Board of Tax Appeals in its findings *"as a protest made by A. A. Schlesinger purporting to be made* on behalf of the Chemical Works." (22 *B. T. A.* 843.)

It is stated in the body of the instrument that the sole basis of the protest is the refusal of the Commissioner to allow the affiliation of the Chemical Company with the Newport Mining Company and that the latter joins in the protest (Rec. 59). A. A. Schlesinger who made the affidavit attached to the instrument was also one of the five owners (stockholders) of both the Chemical Company and the Mining Company at the time of their dissolution (Rec. 34) and had the same personal interest in the determination of the

tax liabilities of the two companies as H. J. Schlesinger who signed the various instruments in the name of the Chemical Company after it had ceased to exist. A. A. Schlesinger was on the stand as a witness on the hearing before the Board (Rec. 26-31), but was not asked to testify as to whether he was acting for the Newport Company or for himself in verifying the instrument in question. There is no evidence that the unsigned protest was acknowledged by the Commissioner or that he relied upon it or paid any attention to it.

According to a ruling of the Department then in force, C. B. III-2, p. 286:

> "The letter of protest and briefs of argument filed with he Income Tax Unit as authorized by Treasury Decision 3616 (pp. 275, 278) must be signed by the taxpayer or his duly authorized agent or attorney.
>
> The statements of fact relied upon by the taxpayer in support of his protest must be furnished in the form of an affidavit and signed by the taxpayer. The affidavit will not be accepted under any circumstances if signed by taxpayer's attorney or other representative. Statements of fact by disinterested persons submitted by the taxpayer in support of his protest should be in the form of an affidavit."

It is well established that estoppel is not favored in the law and to establish it, all of its essential elements must be proved with particularity and precision *and that nothing can be supplied by inference or intendment.*

Standard Sanitary Mfg. Co. vs. Arrott, (C. C. A. 3rd Cir.) 135 Fed. 750, 757;
10 *Ruling Case Law,* p. 845, Sec. 150 and numerous decisions there referred to;
Grouf vs. State National Bank, (C. C. A. 8th Cir.) 40 Fed. (2d) 2, 7;
Central Improvement Co. vs. Cambria Steel Co., 210 Fed. 696, 718;
Brant vs. Virginia Coal & Iron Co., 93 U. S. 326, 335.

It is manifest that the evidence referred to in the petition is insufficient to establish an estoppel as against the respondent, and a review of the entire record would show that it contains practically no evidence that meets the requirements of evidence to establish estoppel.

On the contrary the undisputed evidence shows there is no basis for the application of the doctrine as matter of law.

It is conceded in the petition that the Commissioner received notice in connection with the Chemical Company's tax returns for the year 1919 and 1920 *that the company was dissolved* (Pet. p. 6). The record shows that he received the same notice with reference to the year 1917. In response to the questionnaire referred to on page 5 of the petition the Commissioner in a letter to the respondent dated August 10, 1921 requested full information under oath as to the dissolution of the companies referred to in the questionnaire, the Newport Mining Company and the Chemical Company, including the dates of the cancellation of their charters, and as to the status of the companies referred to

during the years 1917 and 1918 (Rec. 65, 66). The information required was furnished by the respondent in its letter of August 26, 1921, in which the affidavit of its secretary was enclosed (Rec. 66, 67). Thereafter, July 17, 1922, in a letter to the respondent, the Commissioner again referred to the questionnaire and to the consolidated income and profits tax returns filed by the respondent for the years 1919 and 1920 in which reference was made to the dates of the dissolution of the *Chemical Company* and the *Mining Company*, with a ruling based thereon with respect to their affiliations to the date of their dissolution and thereafter (Rec. 71-73). As said in the decision of the Board of Tax Appeals:

> "The evidence discloses that the petitioner" (the respondent here) "on numerous occasions prior to the expiration of the statutory period of limitations informed respondent" (the Commissioner) "that the Newport Chemical Works Inc. had been dissolved.
>
> 22 *B. T. A.* 846.

There is no claim in the petition that the Commissioner did not have full knowledge that the Chemical Company had been dissolved *in the year 1920* during the *period from 1924 to 1926,* inclusive, when he was asking for and accepting waivers signed in its name by one who had no interest in or connection with the respondent.

Where the essential facts were known to the party setting up the estoppel there can be no estoppel.

Hirning vs. National Reserve Bank, (C. C. A. 8th Cir.) 52 Fed. (2d) 382, 388 and numerous cases there cited.

Pomeroy's Equity Jurisprudence, 3rd Ed. Sec. 810;

Fellows vs. National Can Co., 257 Fed. 970, 977; certiorari denied 250 U. S. 662.

Neither the Chemical Company nor the Newport Mining Company filed any income tax return after their returns for the year 1920 in which the Commissioner was advised of their dissolution. The Commissioner should at least have been put on inquiry as to whether instruments purporting to be waivers, for the year 1917, executed in the name of the Chemical Company in the years 1924, 1925 and 1926, were executed with any authority. *There is no evidence in the record that he made any inquiry.*

Speaking of equitable estoppel, this court in *Brant vs. Virginia Coal & Iron Co.,* 93 U. S. 326, 335:

> "For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. In all this class of cases * * * the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in fact implies fraud."

The Board of Tax Appeals found that there was no deception practiced by the respondent.

22 *B. T. A.* 846.

As said in *Standard Sanitary Mfg. Co. vs. Arrott,* (C. C. A. 3rd Cir.) 135 Fed. 750, 756-757:

> "In the absence of expressly proved fraud, there can be no estoppel based upon the acts or conduct of the parties sought to be estopped, where such conduct is as consistent with an honest purpose or with an absence of negligence, as with their opposites."

With the knowledge that the Commissioner had of the facts, his action in continuing to ask for and accept waivers after the taxpayer corporation had gone out of existence can only be explained on the ground of a mistake of law.

It is said in the petition, "The respondent was the real party in interest and received the benefit of the reconsideration given to the tax liability of the Chemical Company (p. 17).

Assuming that to be so, that in itself would not be sufficient to work an estoppel against it. The elements of an estoppel are well established.

To constitute an estoppel, the party claiming to be estopped must be misled as to the facts and the party to be estopped must in some sense be responsible therefor.

Grouf vs. State National Bank, (C. C. A. 8th Cir.) 40 Fed. (2d) 2, 7.

Bigelow on Estoppel, 634, 635.

As pointed out above, H. J. Schlesinger who executed the instruments in question was also *a real party in interest* in the determination of the tax liabilities of the *Chemical Company* while he had no interest whatever in the respondent.

It was not necessarily *for the interest* of the respondent because it had agreed to pay the tax liability of the *Chemical Company* that the period within which the Commissioner was required by law to determine them should be extended over a period of nearly ten years. It is of some importance to a corporation to know its liabilities and so be able to make financial statements that can be relied on. The respondent as a transferee had the right to assume that it could successfully defend against an excessive assessment of its transferor. (*Wayne Body Corporation vs. Commissioner*, 23 B. T. A. 401, 411.) There could be no jeopardy assessment or other assessment against it as a transferee prior to the 1926 Act. That all of the proposed assessments *including that proposed in the 60 day letter*, were excessive and might have been successfully defendant against is shown by the fact that they varied from $226,710.08 (Rec. 46) down to $43,527.25 (Rec. 9). That the last, (proposed in the 60 day letter March 14, 1927), was still erroneous and excessive is shown by the fact that on the hearing before the Board of Tax Appeals it was voluntarily reduced $11,333.69, bringing the amount claimed down to about $32,000. (Rec. 17). More than ten years had then elapsed since the return was filed, and the taxpayer corporation had been dissolved and out of business for almost as long. The statute of limitations,

under the circumstances, was the natural and proper defense for the transferee. The limitation provision embodied in the revenue acts should be liberally construed in favor of the taxpayer.

U. S. vs. Updike, 281 U. S. 489, 496.

III.

The decision of the court below is not in conflict with the decisions referred to on pages 13 and 14 of the petition.

In *Phillips vs. Lyman H. Howe Films Co.*, 32 Fed. (2d) 891, there was a statutory merger of the corporate entities of the companies involved.

In this case there was no merger of corporate entities. The transaction was one of purchase and sale between the two corporations.

Woodley Petroleum Co. vs. Commissioner, 16 B. T. A. 253, 256.

The transaction was in the middle of the year 1919. The Chemical Company continued without change in its corporate existence until March 1, 1920, when it was dissolved. Its corporate existence continued for three years thereafter.

The separate legal entities of corporations cannot be disregarded, for purposes of taxation, however their stock may be held.

Planters Cotton Oil Co. vs. Hopkins, 286 U. S. 332; 52 S. Ct. 509;

Burnet vs. Clark, decided December 12, 1932, 53 S. Ct. 207, 209.

Burnet vs. Commonwealth Improvement Co., decided December 12, 1932, 53 S. Ct. 198, 199.

In *Lucas vs. Hunt,* 45 Fed. (2d) 781, Hunt, the former president of a dissolved corporation who was himself the transferee of its assets signed a waiver for the corporation after it had ceased to exist without notice to the Commissioner that it had been dissolved. The court held he was estopped to deny the validity of the waiver that he signed and upon which the Commissioner acted and relied.

Warner Collieries Co. vs. U. S., 63 Fed. (2d) 34, was a suit in equity brought in the District Court, against the Collieries Company to recover against it as a transferee, a deficiency in tax as finally determined by the Board of Tax Appeals against its transferor. The ground of the decision was that the appeal to the Board of Tax Appeals was taken in the name of the dissolved transferor company against which the assessment was made and carried to conclusion without the question of its dissolution or the bar of the statute of limitations being raised. It was found by the District Court as a fact and not questioned in the appellate court, that the party who prosecuted the appeal in the name of the dissolved corporation was the Collieries Company, the transferee; that it paid the expenses of the appeal and conducted and controlled the proceedings throughout. The court held

that the Collieries Company thereby became a party to the proceedings before the Board of Tax Appeals and as such was bound by the order of the Board affirming the assessment and determining the deficiency and could not be heard to question its validity proceedings. The grounds of the decision were stated in the opinion of the District Court, as follows:

> "No objection based on the statute of limitations, extinguishment of liability under section 1106(a), Revenue Act 1926, or invalidity of the waivers was made before the Board of Tax Appeals. In due course both proceedings were closed by stipulations signed by counsel. • • •
>
> "The conclusion that the orders of the Board of Tax Appeals were binding on the Collieries Co. disposes of its defenses that the waivers were invalid, the statute of limitations prevented assessment or collection of the additional taxes, the tax liability was extinguished, and the Board without jurisdiction because the deficiency letters proposed assessment against a non-existing corporation. Those questions, including alleged invalidity of some of the waivers because they were not signed on the part of the commissioner by one with authority to use his name, should have been raised before the Board and its decision reviewed." (Citing cases.) "The orders of the Board are final. • • •".
>
> "Upon receipt of the notices from the commissioner the trustees of the Wolf Run Co. or

the Warner Collieries Co. might have filed petitions with the Board in their own name, for both were liable to the government and were 'taxpayers' *U. S. vs. Updike,* and *Routzhan vs. Tyroler, supra.* In such proceedings the bar of the statute, extinguishment of liability, and validity of waivers, were matters necessarily involved in determining the existence of any deficiency. Sec. 906 (e) and 1106 (a) Rev. Act. 1926. They could have been raised without admitting existence of the Wolf Run Co.'s

Prentice-Hall Service 1931, Par. 821 (apparently not officially reported).

It is obvious that the facts upon which these cases were decided bear no resemblance to the facts in the instant case and that there is no conflict.

The Court is informed in the petition that there are certain other cases now pending before the Court of Appeals for the Seventh Circuit which it is said involve some of the questions involved in this case. As to that we can only say that the record in those cases is not before the Court, and they will doubtless receive the required attention if and when they come before it.

In conclusion, it is submitted that the petition should be dismissed.

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